STATE OF MICHIGAN

IN THE SUPREME COURT

AMERICAN ALTERNATIVE INSURANCE COMPANY, INC., a New York Corporation, Individually, and as Subrogor of DVA AMBULANCE, INC.,

Plaintiff-Appellant,

-vs-

DONALD JEFFREY YORK,

Defendant-Appellee.

Supreme Court No. 121968

Court of Appeals No. 227917

Shiawassee County Circuit Court File No. 98-2751-CK
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DEFENDANT-APPELLEE'S BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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BASIS OF JURISDICTION

Plaintiff-Appellant American Alternative Insurance Company seeks leave to appeal from a decision of the Court of Appeals dated June 25, 2002. *The Court of Appeals' Opinion is attached at Exhibit 1.* Plaintiff-Appellant filed its Application for Leave to Appeal on July 16, 2002. This Court has jurisdiction of Plaintiff-Appellant's Application for Leave to Appeal pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTION INVOLVED

WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TRIAL COURT ERRED WHEN THE TRIAL COURT CONCLUDED THAT §3135(3)(a) OF THE NO-FAULT ACT NULLIFIES THE IMMUNITY FROM LIABILITY FOR PROPERTY DAMAGE OTHERWISE PROVIDED BY THE ACT WHEN DAMAGE IS CAUSED BY A PERSON'S "WILFUL AND WANTON" MISCONDUCT LESS THAN INTENTIONAL EVEN THOUGH §3135(3)(a) CLEARLY AND UNAMBIGUOUSLY REQUIRES "INTENT TO CAUSE HARM."

The Court of Appeals said "Yes."

Defendant-Appellee says "Yes."

THE SUPREME COURT'S CONSIDERATION IS NOT NECESSARY

Plaintiff-Appellant's Application for Leave to Appeal does not demonstrate any of the circumstances expressed in MCR 7.302(B) that might necessitate this Court's consideration of the issue presented. The Court of Appeals' decision properly limits an earlier decision of the Court of Appeals that too broadly interpreted MCL 3135(3)(a); MSA 24.13135(3)(a). The Court of Appeals properly declared that that statutory provision applies only to "intentionally caused harm" and that, accordingly, the statute does not contemplate "conduct less than intentional." Accordingly, this Court should deny Plaintiff-Appellant's Application for Leave to Appeal.

STATEMENT OF FACTS

1. Nature Of The Action.

Plaintiff-Appellant (hereinafter, "Plaintiff") claims that Defendant-Appellee York (hereinafter, "York"), driving a motor vehicle while intoxicated, collided with an ambulance that Plaintiff insured. Thereafter, Plaintiff paid insurance benefits to the owner of the ambulance because of the property damage that York caused the ambulance in the collision.

Section 3135(3) of Michigan's No-Fault Insurance Act, MCL 500.3135(3); MSA 24.13135(3), generally immunizes a tort-feasor from liability for property damage to a motor vehicle. Plaintiff, however, claims that York was not entitled to that immunity pursuant to subsection (a) of §3135(3), which nullifies the immunity otherwise provided if the tort-feasor "intentionally caused [the] harm . . . ." MCL 500.3135(3)(a); MSA 24.13135(3)(a).

York denies that he "intentionally caused [the] harm" as contemplated by §3135(3)(a) to the ambulance that Plaintiff insured. York otherwise does not contest Plaintiff's claim.

2. Pleadings And Proceedings.

On or about December 21, 1998, Plaintiff filed its Complaint against York. After discovery, York filed a Motion for Summary Disposition, seeking a dismissal of Plaintiff's claims.

The Trial Court heard York's Motion for Summary Disposition on May 30, 2000. York's Motion was based in part on the deposition of York taken

May 19, 1999. *A copy of the transcript of that deposition is attached as Exhibit 2.*

The Trial Court denied Defendant's Motion for Summary Disposition on May 30, 2000. Immediately following the Trial Court's ruling, the parties proceeded to a trial by the Trial Court. The parties agreed that the Trial Court when it made its decision following trial would consider the facts to which York testified in York's deposition taken May 19, 1999. *Tr., pp. 15, 26-27, 37-38, 40-44.*[1]

At the conclusion of all of the evidence, the Trial Court ruled in favor of Plaintiff. The Trial Court determined that York was not entitled to the immunity from liability for property damage provided by §3135(3) because York's conduct before the collision convinced the Court that York's conduct was "wilful and wanton," and that, accordingly, York had "intentionally caused [the] harm" as contemplated by §3135(3)(a) to the ambulance.

The Trial Court entered Judgment on its decision on May 26, 2000. York filed his Claim of Appeal in the Court of Appeals on June 16, 2000.

York in the Court of Appeals asserted that the Trial Court erroneously judged York's conduct at and before the collision against a legal standard that the Legislature did not contemplate in §3135(3)(a) but that, in any event, when judged even by the appropriate standard, the evidence does not support the Trial Court's conclusions. The Court of Appeals in an Opinion dated June 25, 2002 agreed with

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[1]References to York's deposition transcript appear as *York dep., pp. ___*. References to the transcript of the hearing on York's Motion for Summary Disposition and the subsequent trial appear as *Tr., pp. ____*.

York that the Trial Court had erred when the Trial Court determined that Plaintiff had demonstrated the intentional tort necessary according to §3135(3)(a) to avoid the immunity to which York otherwise is entitled pursuant to §3135(3). *See attached Exhibit 1.* The Court of Appeals remanded the matter to the Trial Court for further proceedings consistent with the Court of Appeals' Opinion. *Id.*

3. Facts.

During the evening of December 23, 1997, at approximately 10:30 p.m., York, while operating a motor vehicle, collided with an ambulance. *Tr., pp. 13, 46.* The accident occurred at the rural intersection of Garrison and Byron Roads. *Tr., pp. 46, 52.* York at the time was traveling eastbound on Garrison Road; the ambulance was traveling northbound on Byron Road. *Tr., pp. 46-47.*

Eastbound traffic on Garrison Road at the intersection of Byron Road was controlled by a stop sign; northbound traffic on Byron Road at the intersection had no traffic control. *Tr., p. 47.* The collision occurred when York failed to stop at the stop sign. *Tr., p. 47.*

Earlier in the evening of the accident, York had been at the Crossroads Inn. *Tr., p. 47.* York before attending the Crossroads Inn had made arrangements with his wife to pick him up at the Crossroads Inn. *Tr., p. 48.* The Yorks made that arrangement specifically so that York's wife could act as a so-called "designated driver," because York intended to consume alcohol while at the Crossroads Inn. *Tr., pp. 48-49.*

Although York knew before he went to the Crossroads Inn knew that he would be consuming alcohol, he had no intention to become intoxicated. *Tr., pp. 49, 55.* In fact, York had no intention to consume any particular amount of alcohol. *Tr., p. 50.* The Yorks agreed to their pre-arranged plan as a precaution, because York did not want to drive home in the event he consumed too much alcohol. *Tr., p. 49.*

York is not certain how much alcohol he consumed while at the Crossroads Inn. His best estimate is that he consumed "about a beer to a beer and-a-half per hour and a shot of liquor." *York dep., p. 57.* York consumed that alcohol over a period of between six and seven hours. *York dep., p. 66.* York also had dinner while at the Crossroads Inn. *Tr., p. 67.*

York's wife did arrive at the Crossroads Inn to pick up York. *Tr., pp. 47, 50.* She arrived at approximately 10:10 p.m. *York dep., p. 18.* York's wife after she arrived at the Crossroads Inn made no observations of York that led her to believe that York "was drunk or intoxicated, or impaired." *Tr., p. 78.*

York did not ride home from the Crossroads Inn with his wife, notwithstanding their pre-arranged plan. *York dep., p. 18.* After a third party refused to ride home with the Yorks, York, misunderstanding the circumstances, drove his own vehicle from the Crossroads Inn, believing he was to travel in a caravan of three vehicles, the other two vehicles being operated by his wife and the third party. *York dep., pp. 17-20.*

When York left the Crossroads Inn, the "thought didn't occur" to York that it was not wise for him to operate his own vehicle to travel home. *York dep., p. 23.* Similarly, it never crossed York's mind that he would "potentially endanger other motorists by operating" his vehicle after consuming alcohol. *York dep., p. 26.*

York has no recollection that while he drove his automobile after departing the Crossroads Inn that he felt intoxicated. *York dep., p. 28.*[2] York does not recall that he encountered any automobile traffic enroute to the intersection where the collision occurred. *Tr., p. 53.*

The speed limit on Garrison Road in advance of the intersection is 45 miles per hour. *See Plaintiff's Exhibit 1 admitted during the trial, p. 36.* York did not exceed that speed limit. *Id.*

York never saw the stop sign at the intersection of Garrison and Byron Roads. *York dep., p. 31.* He has no recollection why he did not see that stop sign. Id. The intersection, however, was dark, without artificial lighting, and the night was foggy. *York dep., p. 13.*

York saw the ambulance with which he collided "all of a sudden," just "instantaneous[ly]," before the collision. *York dep., p. 34; Tr., p. 96.* He had no opportunity after he first observed the ambulance to take any evasive action. *Tr., p. 96.* York is not certain why he did not see the ambulance any earlier. *York*

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[2]Although York concedes, in retrospect, that he was intoxicated, given breathalyzer and blood test results following the collision.

dep., p. 33. The ambulance, however, was traveling without activated hazard lights or siren. *Tr., pp. 40, 41-42.*

4. The Trial Court's Decision.

The Trial Court determined that York was not entitled to immunity provided by §3135(3) from liability for the property damage York caused the ambulance. *Tr., pp. 28-35, 104-107.* The Trial Court first concluded that, under §3135(3)(a), York had no immunity if his conduct was "wilful and wanton." *Tr., pp. 30-35.* The Trial Court then concluded that York's conduct was "wilful and wanton" because York before the collision abandoned his pre-arranged plan for his wife to drive him home from the Crossroads Inn, notwithstanding that York was intoxicated. *Tr., pp. 33-35, 105-107.*

5. The Court Of Appeals' Decision.

The Court of Appeals declared that the Trial Court erred because York's conduct was not tantamount to the intentional conduct required by §3135(3)(a). The Court declared that "the statute requires a showing that [York] intentionally caused the harm that occurred." *See attached Exhibit 1, p. 3.*

The Court of Appeals acknowledged that the Court in Citizens Ins Co v Lowry, 159 Mich App 611; 407 NW2d 55 (1987), in the course of its interpretation of §3135(3)(a) held that "wilful and wanton misconduct . . . is in the same class as intentional wrongdoing," and that the Lowry Court on the facts presented it had found wilful and wanton misconduct sufficient to demonstrate the

"intentionally caused harm" required by §3135(3)(a). The Court of Appeals "limited" the Lowry opinion as follows:

> Because §3135 used the phrase "intentionally caused harm," and that phrase is unambiguous, we must enforce it as written. Therefore, the phrase "willful and wanton" may be substituted for "intentional" only to the extent that it has the same meaning as "intentional." As the above quotations of *Lowry* . . . suggest, "willful and wanton" is generally equated with "intentional." Therefore, to the extent that *Lowry* equates "willful and wanton" with "intentional," we agree with the decision in *Lowry*. *However, to the extent that "willful and wanton" is read to include conduct less than intentional, such as recklessness, then the decision in* ***Lowry*** *improperly interpreted the statute and cannot stand.* Therefore, we agree with *Lowry* to the extent that it employs a meaning of "willful and wanton" that is synonymous with "intentional" and we limit its holding accordingly.

See attached Exhibit 1, p. 3 (emphasis supplied).

The Court of Appeals then thoroughly reviewed the facts presented the Trial Court and determined that the Trial Court's decision "that [York's] conduct was sufficiently willful and wanton as to amount to intentional conduct for purposes of §3135(3)(a)" was clearly erroneous. The Court held that Plaintiff had not demonstrated that York's conduct fell "within the narrower construction of 'willful and wanton' that must be utilized in this case—a construction that equates with 'intentional,' as required by the language of the statute." *See attached Exhibit 1, pp. 3-4.*

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIAL COURT IMPROPERLY DEPRIVED YORK OF IMMUNITY FROM LIABILITY PROVIDED BY THE NO-FAULT ACT WHEN THE TRIAL COURT JUDGED YORK'S CONDUCT BY A LESS DEMANDING STANDARD THAN THE LEGISLATURE INTENDED WHEN THE LEGISLATURE ENACTED THE "INTENTIONAL HARM" STANDARD IN §3135(3)(a) OF THE ACT.

A. Applicable Standard Of Review.

"The interpretation of statutes is a question of law" that the appellate courts review *de novo*. Hoste v Shanty Creek Mgm't, Inc, 459 Mich 561, 569; 592 NW2d 360 (1999). See also Haliw v City of Sterling Heights, 464 Mich 297, 302; 581 NW2d 581 (2001). That *de novo* review requires no deference to the trial court. Wechsler v Wayne County Road Comm'n, 215 Mich App 579, 599; 546 NW2d 690 (1996), remanded on other grounds, 455 Mich 863; 567 NW2d 252 (1997).

An appellate court reviews a trial court's findings of fact to determine whether the findings of fact are "clearly erroneous." MCR 2.613(c). See also, e.g., Buchanen v City Council of Flint, 231 Mich App 536, 545-546; 586 NW2d 573 (1998), lv den, 461 Mich 867 (1999). Clear error "occurs if an appellate court is left with a firm and definite conviction that a mistake has been made." Id.

B. The Legislature Never Intended That §3135(3)(a) Would Nullify The Immunity Otherwise Provided By The No-Fault Act Against Liability For Property Damage Where A Person's Conduct Is "Wilful And Wanton" But Not "Intentional."

1. *Section 3135(3)(a) Of The No-Fault Act.*

This Court of Appeals' task on appeal was to interpret §3135(3)(a) to determine the conduct that the Michigan Legislature intended would nullify the immunity from liability for property damage otherwise provided by §3135(3). Section 3135(3)(a) provides in pertinent part as follows:

> Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle . . . is abolished except as to:
>
> (a) ***Intentionally caused*** harm to persons or property. ***Even though a person knows that harm to persons or property is substantially certain*** to be caused by his or her act or omission, ***the person does not cause or suffer that harm intentionally*** if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.

MCL 500.3135(3)(a); MSA 24.13135(3)(a) (emphasis supplied).

2. *Rules Of Statutory Construction.*

In Robinson v Detroit, 462 Mich 439; 613 NW2d 307 (2000), the Michigan Supreme Court most recently acknowledged long-established rules of statutory construction applicable to the Court of Appeals' task. The Robinson Court emphasized the following rules:

1. "Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute."

2. "Each word of a statute is presumed to be used for a purpose . . . . "

3. "The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another."

4. "Where the language of the statute is clear and unambiguous, the Court must follow it."

462 Mich at 459 (citations omitted). Given the Robinson rules of construction, the Court of Appeals correctly determined that the Trial Court erred when it judged York's conduct for purposes of §3135(3)(a) by a "wilful and wanton" misconduct standard that did not reflect the "intentionally caused harm" standard the Legislature expressly declared in §3135(3)(a).

3. *Section 3135(3)(a) Clearly And Unambiguously Expressly Applies Only To "True Intentional Torts" And Where A Person Acts **Knowing** Harm Is **Substantially Certain**.*

Section 3135(3)(a) clearly and unambiguously expresses the Legislature's intent with respect to the standard by which a tort-feasor's conduct is to be measured. See Hicks v Vaught, 162 Mich App 438, 440; 413 NW2d 28 (1987) [§3135(3)(a), formerly §3135(2)(a), "***unambiguously*** requires a person to intend to cause harm . . . . "]. The first sentence of §3135(3)(a) provides that a person that ***intentionally cause[s] harm to . . . property*** has no immunity from liability for that damage. Certainly, then, §3135(3)(a) nullifies the immunity a person otherwise would have against a claim for property damage where the person

commits a so-called "true intentional tort" because the person intended not only his actions, but also the resulting damage.[3]

The language of §3135(c)(3), however, also makes clear that the Legislature intended that *some* conduct, expressly and narrowly defined, not tantamount to a "true intentional tort" likewise would nullify immunity from liability for resulting damage. In that regard, the second sentence of §3135(3)(a) provides that ***a person [that] knows that harm to . . . property is substantially certain to be caused by his act or omission*** is entitled to immunity if acting to avoid injury to another or damage to property. The Legislature would have had no cause to expressly immunize from liability a person that acts "know[ing] that harm to . . . property is substantially certain" in the limited circumstance provided if the statute otherwise did not contemplate such liability generally.[4]

The express language of §3135(3)(a), then, makes clear that the Legislature intended that there be no §3135(3) immunity from liability for property damage caused ***only:***

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[3]See Beauchamp v Dow Chemical Co, 427 Mich 1, 20; 398 NW2d 882 (1986), for an instructive discussion of the "true intentional tort" concept.

[4]The Legislature thus adopted the common law concept of the "substantial certainty intentional tort." See, e.g., Beauchamp, supra, at 20-22. That common law concept, like §3135(3)(a), recognizes that an intentional tort occurs where a person "***intended the act*** that caused the injury ***and knew*** that the injury was substantially certain to occur from the act . . . ." Id at 20 (emphasis supplied). That is, "***[i]f the actor knows*** that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." Id at 21 (footnote omitted; emphasis supplied).

1) where the person commits a "true intentional tort" because the person intended not only his actions but also the resulting harm; and

2) where the person commits a "substantial certainty intentional tort" because the person acts ***know[ing] that harm to . . . property is substantially certain to be caused . . . .***

The statute nowhere includes any language suggesting that the Legislature contemplated any other circumstance for which a person is to be denied the immunity otherwise provided by §3135(3), and particularly nowhere includes any language suggesting that "wilful and wanton" misconduct is such a circumstance.

4. *The Courts May Not "Engraft" On §3135(3)(a) Any Different Standard Of Conduct.*

Given that the Legislature at §3135(3)(a) has declared the standard by which the courts are to judge whether a person has committed intentional damage nullifying the immunity the No-Fault Act otherwise provides, the courts have no authority to impose, or "engraft," a different standard. The authority to establish such a standard is the Legislature's alone. Pavlov v Community Emergency Medical Services, Inc, 195 Mich App 711, 717; 491 NW2d 874 (1992), lv den, 442 Mich 884 (1993). See also Jennings v Southwood, 446 Mich 125, 142; 521 NW2d 230 (1994) (where a statute expressly describes a standard to be applied, that "express mention . . . of one [standard] applies to the exclusion of other [standards]").

In Pavlov, supra, the plaintiff had argued that the legislative standard declared in "the former emergency medical services act, MCL 333.20701, et seq;

MSA 14.15(20701), et seq," requiring "gross negligence or wilful misconduct" included also "wilful ***and wanton*** misconduct." Pavlov, supra, at 714-716 (emphasis supplied). The Pavlov Court rejected that argument, observing that the plaintiff's proposed standard "is not included in [the statute's] plain language," that the Court did not "possess that legislative power and authority," and that "[h]ad the Legislature wished . . . it could have used the phrase "wilful and wanton" as it appears in, for example, the recreational user's statute . . . ." Id at 717. The Jennings Court agreed with the Pavlov analysis. Jennings, supra, at 138-142.

5. *The Legislature Has Declared A "Wilful And Wanton" Standard In Other Statutes When It Intends That Standard.*

The Legislature over the years clearly has been aware of the "wilful and wanton" standard for judging misconduct, and frequently has employed that precise phrase in its statutes. See, for example, the good samaritan act, MCL 691.1502(1); MSA 14.563(12)(1); the guest passenger act, formerly at MCL 257.401; MSA 9.2101; the recreational use act, formerly at MCL 300.201; MSA 13.1485, now at MCL 324.73301(1); MSA 13A.73301(1). See, e.g., Jennings, supra, at 138-139. Accordingly, because the Legislature demonstrably knows how to impose the "wilful and wanton" misconduct standard when it so intends, the Legislature cannot be said to have intended that standard in a statute that includes no reference to such a standard and that unambiguously expresses only a different, more exclusory, standard. Id at 137-142. See also Pavlov, supra, at 717.

6. *Necessarily, Then, The Court of Appeals Properly Limited The Decision in Citizens Ins Co v Lowry.*

Given the principle recognized in Pavlov, supra, and Jennings, supra, that the courts may not "engraft" on a statute a different or additional standard for judging a tort-feasor's conduct where the Legislature has unambiguously declared the applicable standard, the Court of Appeals properly limited the holding in Citizens Ins Co v Lowry, 159 Mich App 611; 407 NW2d 55 (1987), upon which Plaintiff and the Trial Court relied. In Lowry, the Court held that the parties' stipulation that the defendant had engaged in "wilful and wanton misconduct" pursuant to §3135(3)(a) operated to deny the defendant the immunity provided by §3135(3) because "wilful and wanton misconduct is in the same class as intentional wrongdoing." 159 Mich App at 617.

Thus, as the Court of Appeals observed, the Lowry opinion is potentially overbroad because subject to an interpretation (like the Trial Court reached) that the §3135(3)(a) standard for misconduct "include[s] conduct less than intentional, such as recklessness. . . ." The Court of Appeals accordingly properly limited the Lowry opinion.[5]

C. Public Policy Implications.

The Legislature intended, inter alia, that the No-Fault Act would decrease litigation and associated costs. See, e.g., Shavers v Attorney General,

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[5]Because Lowry was decided before November 1, 1990, the Lowry decision was not binding on the Court of Appeals. MCR 7.215(H)(1).

402 Mich 554; 267 NW2d 72 (1978), cert den, 99 S Ct 2869; 442 US 934; 61 L Ed 2d 303 (1979). The Legislature implemented a number of strategies to accomplish those objectives, one of which was to declare that insurers rather than tort-feasors, with few and narrowly drawn exceptions, would pay for property damage caused by tort-feasors, and that insurers would do so without regard to fault. Id.

Nothing in the No-Fault Act or its legislative history suggests that the Legislature intended that the no-fault objectives to reduce litigation and associated costs be overridden every time an intoxicated driver causes property damage.[6] Yet, if Plaintiff's theory, and the Trial Court's application of that theory[7], were to become an accepted application of §3135(3)(a), every motor vehicle accident involving an intoxicated driver will create the potential for the costly litigation necessary to determine fault.

Given the foregoing, even were there any ambiguity in the Legislature's declaration at §3135(3)(a), the Court of Appeals properly avoided the expansive and costly consequence of Plaintiff's interpretation, and the Trial Court's application, of §3135(3)(a), inconsistent with the Legislature's objectives. Rather,

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[6]It is instructive that the Legislature has demonstrated that, when it intends to establish unique rules for intoxicated drivers, it does so unambiguously. See, for example, MCL 600.2955(a); MSA 27A.2955a, where the Legislature declared unique comparative negligence rules for, inter alia, drivers whose ability to function due to the influence of alcohol contributes to an accident.

[7]Essentially, the Trial Court concluded that York's intoxication without more was sufficient to find that his conduct was wilful and wanton.

the Court of Appeals properly interpreted the statute consistent with the Legislature's objective. See, e.g., Frost-Pack Distributing Co v Grand Rapids, 399 Mich 664, 682-683; 252 NW2d 774 (1977).

D. Not Even A Scintilla Of Evidence Suggests That York At Any Pertinent Time Acted "Know[ing] That Harm Was Substantially Certain" To Follow.[8]

The "substantial certainty intentional tort" standard requires "certainty," or, inevitability. The standard would be "misapplied" were a court to require only substantial "likelihood." Beauchamp, supra, at 25. Moreover, the standard is not satisfied by "reckless" conduct. Id at 24.[9]

Whatever else may be said about York's conduct, no evidence presented to the Trial Court suggested even a reasonable inference that York departed the Crossroads Inn driving his own vehicle "know[ing] that harm was substantially certain" to follow. There was no evidence presented to the Trial Court that York, from the time he left the Crossroads Inn until just before he failed to stop at the stop sign at the intersection of Garrison and Byron Roads, drove his vehicle in any manner except lawfully.

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[8]Plaintiff's counsel agreed during trial that Plaintiff could not prove a "true intentional tort." *Tr., p. 16.*

[9]The language of §3135(3)(a) requires that the Trial Court have determined York's ***subjective*** intent. See, e.g., Frechen v DAIIE, 119 Mich App 578, 580-582; 362 NW2d 566 (1982), cited with approval in Hicks, supra, at 440. The Frechen Court acknowledged that "[m]ost automobile accidents involve volitional acts, such as speeding, ***drunk driving***, or disobedience to traffic signals, ***which yield unintentional consequences***." 119 Mich App at 581 (emphasis supplied).

There was no evidence presented to the Trial Court that York knew he was driving his vehicle while under the influence of alcohol. There was no evidence presented to the Trial Court that York at the time he departed the Crossroads Inn and before the collision believed himself intoxicated. *York dep., p. 28.*

Indeed, the evidence presented to the Trial Court demonstrated only that York did not think it unwise for him to operate his own vehicle to travel home and that York did not think he would "potentially endanger other motorists by operating" his vehicle after consuming alcohol. *York dep., pp. 23-26*. York's conduct certainly fell below an acceptable standard of care, but he clearly did not know that the result of that conduct was substantially certain.[10]

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[10]Plaintiff has persisted in erroneously asserting that York's plea of a "no contest" and resulting criminal conviction for violation of MCL 257.625(4); MSA 9.2325(4) is dispositive of the issues in this civil litigation. A party's "no contest" plea, of course, may not be used *affirmatively* by an opposing party in civil litigation; as a consequence, nothing about York's "no contest" plea precludes York from contesting Plaintiff's claim that York intentionally caused harm to Plaintiff's ambulance. See, e.g., Lichon v American Universal Insurance Co, 435 Mich 408; 459 NW2d 288 (1990).

Although the Michigan Rules of Evidence upon which the Lichon Court relied have since been amended, the amendments change the Lichon result and permit a party's use of another's "no contest" plea and resulting conviction only "to support a *defense* against a claim asserted by the person who entered the plea." See MRE 410(2) (emphasis supplied); MRE 803(22). That is, even the amended rules of evidence preclude Plaintiff's effort to *affirmatively* use York's "no contest" plea and resulting conviction. Cf Carpenter v Consumers Power Co, 230 Mich App 547; 584 NW2d 375 (1998), companion case reversed on other grounds, 463 Mich 1; 615 NW2d 17 (2000).

In any event, however, York's "no contest" plea and resulting conviction for violation of MCL 257.625(4); MSA 9.2325(4), is not dispositive of the penultimate

(continued...)

Given the foregoing, the Trial Court clearly erred when it found that York's conduct satisfied the "intentionally caused harm" standard of §3135(3)(a). No evidence whatever supported that conclusion.

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[10](...continued)
issue in this civil litigation: York's specific intent when he drove his vehicle while intoxicated. Nothing in the criminal statute required proof that York intended to cause harm, although that specific intent is expressly required by MCL 500.3135(3)(a); MSA 24.13135(3)(a), the statute at issue in this civil litigation. See, e.g., People v Lardie, 452 Mich 231; 551 NW2d 656 (1996). Accordingly, when York pleaded "no contest" and was convicted of a violation of the criminal statute, he was not required to (and did not) make any admission regarding his specific intent, and his resulting conviction cannot have implicitly determined that issue.

CONCLUSION

The Trial Court erred when it judged York's conduct for purposes of §3135(3)(a) by a "wilful and wanton" standard that avoided the immunity otherwise declared by §3135(3) for "conduct less than intentional." Section 3135(3)(a) expressly and unambiguously nullifies the immunity from liability for property damage otherwise granted by the No-Fault Act ***only*** when a tort-feasor 1) intends his act and the resulting harm, or 2) intends an act, ***knowing*** that harm is ***substantially certain*** to follow.

Accordingly, the Court of Appeals properly limited the decision in Citizens Ins Co v Lowry, supra, to reject an interpretation of §3135(3)(a) "to include conduct less than intentional." Since not a scintilla of evidence presented to the Trial Court permitted the reasonable inference that York drove his vehicle ***knowing*** that a collision was ***substantially certain*** to follow, the Court of Appeals properly reversed the Trial Court's decision that York is not entitled to the immunity provided by §3135(3).

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellee York prays that this Court deny Plaintiff-Appellant's Application for Leave to Appeal the Court of Appeals' Decision dated June 25, 2002.

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Defendant-Appellee

Dated: 7/25/02 By _____
William R. Schulz (P 29147)

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